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No. -

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

SHEIKH MOHAMMED AL-FASSI,
PETITIONER,

v.

SHEIKHA DENA AL-FASSI,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND APPELLATE DISTRICT COURT OF APPEAL FOR THE STATE OF CALIFORNIA

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I.

QUESTION PRESENTED FOR REVIEW

I. Whether the Petitioner's due process rights were denied by the determination of the Court of Appeal of the State of California that the California Superior Court had jurisdiction to award a money judgment pursuant to a division of community property where the judgment was based on non-existent assets or assets not owned by the Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE SECOND APPELLATE DISTRICT COURT OF APPEAL FOR THE STATE OF CALIFORNIA

Petitioner, Sheikh Mohammed Al-Fassi, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, Second Appellate Circuit, of the State of California entered on August 25, 1986.

Opinions Below

The Opinion of the Court of Appeal, Second Appellate District, Division Four, of the State of California, dated August 25, 1986, has not been published in official reports. A copy of the opinion is attached hereto as Appendix A (A-1). The Order of the Supreme Court of California, dated November 19, 1986, denying the Petition for Review is not published in official reports and is attached hereto as Appendix B (B-1).

Jurisdiction

Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1257(3) to review by writ of certiorari final judgments or decrees rendered by the highest court of a state in which a decision could be had.

Constitutional Provision

The following provision of the United States Constitution is involved: U.S. Const. Amend. XIV. The text of said provision is attached hereto as Appendix C (C-1).

Proceedings Below

Petitioner, Sheikh Mohammed Al-Fassi, and Sheikha Dena Al-Fassi were married in Los Angeles, California, on March 5, 1975. On January 20, 1982, Respondent, Sheikha Dena Al-Fassi, filed a petition in the Superior Court of Los Angeles County (No. D063702) seeking disposition of community property. The petition only identified property located at 9561 Sunset Boulevard, Los Angeles, California, although general allegations concerning ownership of several billion dollars worth of property were also asserted.

Initially, Sheikh Mohammed Al-Fassi specially appeared through California counsel and contested the superior court's jurisdiction. That court ultimately determined that it had jurisdiction over the case, and consequently, Sheikh Mohammed Al-Fassi filed a response on or about July 28, 1982.

Despite the fact that Sheikh Mohammed Al-Fassi was not in the United States during this period, the court (Fainer, J., presiding) ordered him to appear and to be deposed in Florida and New York on several occasions. Petitioner's failure to respond to court ordered discovery resulted in an Order defaulting Petitioner pursuant to C.C.P. Section 2304 and striking his response. The default and entry of default was entered on May 31, 1983.

On June 2, 1983, Sheikha Dena Al-Fassi filed a "Partial List of Specific Items of Community Property." This document was Sheikha Dena Al-Fassi's first list of purported community property, other than the Sunset Boulevard property, and references to other realty in unrelated motions. This document also claimed that the identity and ownership of the property listed would be established at a prove-up hearing, scheduled for the next day, through the testimony of Sheikha Dena Al-Fassi and experts on the issue of value, as well as a Cable News Network videotape of approximately twenty minutes in length. On June 3, 1983, the court held a hearing, at which some of the evidence proffered in Sheikha Dena Al-Fassi's June second document was presented. Petitioner's counsel was not permitted to participate in the hearing, Sheikh Mohammed Al-Fassi having been defaulted and his response stricken.

Generally, Sheikha Dena Al-Fassi testified concerning alleged community property in the form of airplanes, jewelry, household furnishings, a coin collection, clothes, a yacht, automobiles, houses, a zoo, and realty. No documentary evidence was admitted into evidence.

Despite the state of the proof and the court's recognition that there were present "onerous conditions in order to find community property," the court, on June 13, 1983, entered a default judgment and awarded Sheikha Dena Al-Fassi a money judgment in the amount of $76,999,500.00 and certain specific real and personal property. The remaining property alluded to in Sheikha Dena Al-Fassi's testimony was awarded to Sheikh Mohammed Al-Fassi, irrespective of whether it in fact existed or was owned by the parties.

On November 29, 1983, Petitioner filed a Notice of Motion and Motion for Orders Vacating Default, Entry of Default, Judgment by Default and Order of Judgment of June 13, 1983, and Granting Respondent Hearing on the Issue of the Identity and Distribution of Property. The motion asserted that the court lacked jurisdiction to order a money judgment and a

distribution of property which were not alleged in the complaint and not owned by Sheikh Mohammed Al-Fassi, and that the default judgment and award were null and void because they were based on insufficient evidence in violation of Sheikh Mohammed Al-Fassi's right to due process of law by virtue of the failure of proof to support the judgment.

Petitioner's motion for orders to vacate was supported by his affidavit directly contradicting Sheikha Dena Al-Fassi's testimony. Additionally, three affidavits of counsel were submitted providing information corroborative of Petitioner's affidavit and explaining the timing of the filing of the motion. Also submitted was the affidavit of Petitioner's father, Sheikh Dr. Shamsuddin Abdullah Al-Fassi, which further corroborated Petitioner's affidavit and flatly contradicted Sheikha Dene Al-Fassi's testimony. Respondent opposed the motion.

At an initial hearing, the court indicated that it might be persuaded to remove the default judgment based on the grounds that it had abused its discretion in rendering that judgment if the parties were able to reach some agreement on the payment of support by Sheikh Mohammed Al-Fassi and visitation regarding the couple's two minor children.

One month later, Petitioner's counsel advised the court that the parties were unable to agree on matters of visitation and support and, consequently, the court entertained argument on the merits of Petitioner's motion for orders to vacate. After hearing argument from counsel, the superior court ruled from the bench as follows: (a) that the court had no present jurisdiction over visitation issues; (b) that the failure of Sheikh Mohammed Al-Fassi to provide discovery was prejudicial; (c) that if the evidence presented to the court at the prove-up hearing contained falsehoods, those falsehoods were in the nature of intrinsic fraud; and (d) that intrinsic fraud is not grounds to set aside a judgment, only extrinsic fraud provides such a basis. Accordingly, the court denied Sheikh Moham-

med Al-Fassi's motion. This denial was confirmed in a Notice of Ruling dated February 21, 1984. A Notice of Appeal was timely filed by Petitioner.

On August 25, 1986, the Court of Appeal, Second Appellate District, Division Four, filed an Opinion affirming the decision of the superior court.

On October 3, 1986, Sheikh Mohammed Al-Fassi petitioned for review of the appellate Court's opinion and judgment to the Supreme Court of California. On November 19, 1986, that petition was denied.

Statement of the Case

As indicated above, the superior court entered its default judgment and $76,999,500.00 money award based on the testimony elicited during the June 3, 1983 prove-up hearing. The description of the couple's assets, their ownership, and value was vague and unsupported. Indeed, in almost all instances, the evidence lacked even the most elementary detail to establish identity. With regard to the realty allegedly owned by Petitioner, excepting the Sunset Boulevard property, no addresses nor specific locations of houses were offered. No airplane or automobile registration numbers nor yacht name or identifying numbers were provided. Nor were bank accounts or liquid assets (cash, stock, money markets, etc.) described. For example, Sheikha Dena Al-Fassi testified that her husband bought a "second floor villa, two floor villa, big villa in Switzerland" for $1,500,000.00. This was the extent of the evidentiary basis for the court's finding that this property was a community asset and its award of half the property's value to Sheikha Dena Al-Fassi. Likewise, the court awarded Sheikha Dena Al-Fassi half the value of a house and other land "outside London" on "Fulmer Street" based on her unsupported testimony that Petitioner purchased this property in 1979.

The court of appeal affirmed the superior court's Order and award based on the findings (a) that perjured testimony and misrepresentation of the value of property are not grounds for setting aside a judgment (App. A-3–A-4);[1] (b) that the judgment did not exceed the amount requested in Respondent's petition (App. A-4); and (c) that the superior court was free to accept and rely on testimony offered at the prove-up hearing (App. A-4–A-5).

Reasons for Granting the Writ

A. The Opinion of the California Court of Appeal is Contrary to the Provisions of the Due Process Clause of the Fourteenth Amendment and is in Conflict with the Decisions of this Court.

Jurisdiction is, in the most fundamental sense, an expression of the power which a court has to act in a certain manner or to give particular kinds of relief. 7 MOORE'S FEDERAL PRACTICE, Section 60.25[2] (1985). This power may be limited by statute, or by inherent notions of the role and duties of a court in our legal system as they have been identified and refined by case law.

Thus, where a court's action involves an absolute disregard for its inherent function, duties, and responsibilities and this disregard results in an obvious usurpation of power, the court's judgment should be deemed void despite the requisite apparent jurisdiction over the parties or subject matter. *See Bigelow* v. *Wall*, 9 Wall 339 (U.S. S.Ct. 1869).

In *Nobel* v. *Union River Loggin Railroad Co.*, 147 U.S. 165, 173-74 (1893), this Court explained the fundamental concept that:

> It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity

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[1] References to the Opinion of the Court of Appeal, Second Appellate District, Division Four, for the State of California are cited as "(App. __)."

> of the proceeding, and without which the act of the court is a mere nullity; such, for example, as the service of process within the State upon the defendant in a common law action, *D'Arcy* v. *Ketchum*, 11 How. 165; *Webster* v. *Reid*, 11 How. 437; "*Harris* v. *Hardeman*, 14 How. 334;" *Pennoyer* v. *Neff*, 95 U.S. 714; *Borden* v. *Fitch*, 15 Johns 121; the seizure and possession of the *res* within the bailiwick in a proceeding *in rem*, *Rose* v. *Himely*, 4 Cranch 241; *Thompson* v. *Whitman*, 18 Wall 457; a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged, *Galpin* v. *Page*, 18 Wall 350; *Guaranty Trust Co.* v. *Green Core Railroad*, 139 U.S. 157. So, if the court appoints an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, *Griffith* v. *Frazier*, 8 Cranch 9; or condemns as lawful prize a vessel that was never captured, *Rose* v. *Himely*, 5 Cranch 241, 269; or a court-martial proceeds and sentences person not in the military or naval service, *Wise* v. *Withers*, 3 Cranch 331; or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. *Id.*

A judgment is also void where the court acted in a manner inconsistent with due process of law. *Williams* v. *New Orleans Public Service, Inc.*, 728 F.2d 730, 735 (5th Cir. 1984). In *Bass* v. *Hoagland*, 172 F.2d 205, 208-11 (5th Cir.), *cert. denied*, 338 U.S. 816 (1949), a divorce judgment entered on the pleadings on default was deemed void and unenforceable on the grounds that the absent defendant was not provided with due process protection. Similarly, in *Simanonok* v. *Simanonok*, 787 F.2d 1517 (11th Cir. 1986), the court ruled that, indeed, there is merit to a constitutional challenge to the validity of a divorce judgment rendered in violation of due process guarantees. *Id.* It cannot be denied that the purpose of

a prove-up hearing is to provide the defaulted defendant with some measure of due process protection. Otherwise, the petitioner testifying in the proceeding could simply name the sum desired and the court would award damages accordingly, dispensing with the formalities of a hearing. Where, as in the instant case, the "proof" offered at hearing consisted of unfounded allegations of unidentified or non-existent property, all semblance of due process of law for the absent party is lost.

The record with regard to the community property which was the subject of the default judgment entered on June 13, 1983, consists only of Sheikha Dena Al-Fassi's testimony at the prove-up hearing. Beyond the falsity of the outrageous testimony regarding alleged ownership of two Boeing 707 airplanes and hundreds of millions of dollars worth of jewelry, as well as allegations of the ownership of real property of which addresses, much less locations, remain unascertained, this testimony was absolutely unsupported by documentary evidence of any kind. The vast majority of claimed community assets were not identified in any meaningful way. In fact, these assets were not the property of the marriage at all, because they did not exist, or, if they did, were not owned by either party to the marriage. A striking example of the complete absence of procedural safeguards and total disregard for the fact-finding purpose of the hearing was the evidence adduced regarding property allegedly purchased by Petitioner which the court found to be a gift from Petitioner to Respondent and her separate property. The property at issue was identified by counsel for Respondent and not by Respondent.

Federal courts charged with determining whether a judgment was void have noted that a lack of evidence on damages may not, by itself, necessarily constitute a violation of due process so egregious as to render the pursuant decree outside the powers granted to the court by law. *Id.*, at 735; *Marshall* v. *Board of Education, Bergenfield, N.J.*, 575 F.2d 417, 422 (2d Cir. 1978); *Fehlhaber* v. *Fehlhaber*, 681 F.2d 1015, 1028

(5th Cir. 1982), *cert. denied*, 104 S.Ct. 79 (1983). It is critical to note, however, that each of the above-cited cases dealt exclusively with the jurisdictional question of a null and void order. Moreover, each court took pains to distinguish its analysis as one appropriate for collateral attacks on the judgments of foreign courts from the analysis called for on a direct attack on appeal. *Williams* v. *New Orleans Public Service, Inc., supra*, at 735; *Marshall* v. *Board of Education, Bergenfield, N.J., supra*, at 422; *Fehlhaber* v. *Fehlhaber, supra*, at 1026 n. 14. Therefore, even if this Court declines to review the jurisdictional issue of whether the instant default judgment was void for lack of due process of law, it is urged, at a minimum, to review the appellate court's opinion for constitutional error.

The total lack of competent proof presented at the prove-up hearing regarding the value or existence of property included in the marital estate rendered that proceeding fundamentally unfair in violation of Petitioner's right to due process of law. The court of appeal, however, failed to directly address this due process challenge, and instead restricted its analysis of the insufficiency of proof exclusively to evidentiary issues. (App. A-4–A-5). Petitioner asserts that had the court entertained his fourteenth amendment claim, the community property judgment would have been set aside because of the patently unfounded bases upon which the court relied in deriving the amount of the settlement order.

Where damages are unliquidated, a default admits only to defendant's liability regarding the well-pleaded allegations in the complaint. *T.W.A., Inc.* v. *Hughes*, 449 F.2d 51, 63 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), *reh'g denied*, 410 U.S. 975; *Thomson* v. *Wooster*, 114 U.S. 104, 105 (1885). The amount of damages, however, must be proven before a constitutionally valid judgment may be entered. *Fehlhaber* v. *Fehlhaber, supra*, at 1026. In the instant case,

the "proof" offered by Respondent was so inherently fallacious and exorbitantly exaggerated that, as a matter of law, it provided no basis in fact upon which damages could be estimated, let alone proved.

Although, as the appellate court opined, a trial judge is free to accept oral testimony as proof of damages, certainly the fourteenth amendment draws a line between plausible oral evidence that can provide a constitutionally valid basis for relief and inherently unbelievable contrivances designed to fabricate a basis where, in fact, none exists. That line was crossed in the instant case, and the invalid judgment that resulted burdened the Petitioner with an unrealistic debt without the benefit of due process, leaving in serious doubt the legal vitality of the order issued by the court. Accordingly, it is respectfully submitted that the appeals court erred in affirming the trial court's judgment and unlawfully saddled the Petitioner with an outrageous money judgment derived from assets which are either non-existent or owned by other parties.

The issue this Court is urged to address is an important one and one that requires the attention of the Court. If it is ever proper for a state court to award a disposition of community property pursuant to a divorce decree entered on a default judgment based solely on the unsupported and undocumented ex-parte testimony of the aggrieved spouse, then this Court should clearly so state; if a state court cannot validly award a disposition of community property absent some indicia of proof of ownership of the subject property, as the Petitioner strenuously asserts, this Court should similarly take this opportunity to act and declare such an award void for want of jurisdiction and a fundamental violation of the absent spouse's due process rights.

Conclusion

Based upon the facts of this case and the foregoing arguments and authorities, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION IN THE OFFICIAL REPORTS

COURT OF APPEAL-SECOND DIST.
FILED
AUG 25, 1986
CLAY ROBBINS, JR., *Clerk*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

No. B016730
(SUPER. CT. NO. D 063702)

IN RE MARRIAGE OF
SHEIKHA DENA AL-FASSI,
PETITIONER AND RESPONDENT,

v.

SHEIKH MOHAMMED AL-FASSI,
RESPONDENT AND APPELLANT.

APPEAL from an order of the Superior Court, Los Angeles County. Robert Fainer, Judge. Affirmed.

F. Lee Bailey, Kenneth J. Fishman, Bailey & Fishman, and *Robert L. Shapiro* for Respondent and Appellant.
Harold Rhoden and *Marvin M. Mitchelson* for Petitioner and Respondent.

Appellant, Sheikh Mohammed Al-Fassi, appeals an order of the superior court denying his request to set aside the default and default judgment entered against him in the dissolution proceeding between himself and his wife, Sheikha Dena Al-Fassi. We affirm.

On January 20, 1982, Sheikha Dena Al-Fassi petitioned the superior court for a division of community property and legal separation from her husband, appellant Sheikh Mohammed

Al-Fassi. Following appellant's repeated failures to attend depositions, answer interrogatories, produce documents, or to obey a single discovery order of any sort, on March 31, 1983, the court ordered appellant's response to the dissolution petition stricken under Code of Civil Procedure section 2034. Under the terms of the order, appellant was given 30 days to respond to the discovery requests or the order would become final. Appellant failed to do so, and on May 31, 1983, default was entered. An oral prove-up was held, and two weeks later, the court entered a default judgment awarding respondent a certain well-known property along Sunset Boulevard and a money judgment of approximately 77 million dollars. On November 29, 1983, two days short of six months from the entry of default, appellant moved to set aside the default and default judgment, contending that the respondent had perjured herself at the oral prove-up, that the amount of the judgment was in excess of the court's jurisdiction and that it was unsupported by documentary evidence. The superior court denied the motion and it is from this order that appellant appeals.

I

At the outset, it should be pointed out that none of the grounds suggested by appellant on appeal can justify setting aside the default. Even assuming that appellant's arguments were true concerning the perjury of the respondent at the oral prove-up, the lack of documentary evidence presented there, and the monetary limitations on the court's jurisdiction, none of these factors would excuse the appellant's repeated willful and intentional disobedience of the court's discovery orders. It is this disobedience and this disobedience alone that caused appellant's response to be stricken and default entered. Indeed, all of the conduct appellant complains of occurred *after* the default was entered and thus could have no effect on the propriety of granting the default. Appellant can suggest no excuse which would justify his repeated refusals to obey court orders, and thus the entry of default must be allowed to stand.

II

What appellant is left with is contesting the *amount* of the default judgment. Appellant does so by contending that his wife lied at the prove-up hearing, that the judgment awarded exceeds the amount requested in the complaint and thus is beyond the court's jurisdiction, and that there was no documentation of the alleged community assets. We find none of these arguments persuasive.

It has long been held that perjury is not a ground for setting aside a judgment on appeal. Beginning in 1891 with *Pico* v. *Cohn* (1891) 91 Cal. 129, 134, the court recognized that while a party against whom perjured testimony has been admitted has suffered a great wrong, allowing the party to overturn the judgment on that ground creates an even greater one. The court observed that: "Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice." (*Pico* v. *Cohn*, *supra*, at 134.) In the context of a marital dissolution, this rule was reiterated as recently as 1979. As the court noted in *In re Marriage of Guardino* (1979) 95 Cal.App.3d 77, 89: "A judgment will not be set aside because of perjured evidence. . . .'The rule is the same whether there was a default judgment or a judgment after a contested trial.' " Appellant does not address this point, but instead, cites numerous cases that concealment of assets is a ground for reversing the judgment in a marital dissolution. Those authorities can have no application here. No one has ever argued that the Sheikha Al-Fassi was concealing community property. Rather, the opposite is true, as appellant contends that his wife grossly inflated the value of the couple's assets. However, misrepresentation of the value of a property is specifically recognized as *not* a ground for reversal of a community property award. (*In re Marriage of Modnick* (1983) 33 Cal.3d 897, 907-908). Finally, all of this is purely academic, as the trial court twice stated that it did not believe that respondent had perjured herself. The only evidence of "perjury" ap-

pellant could present was several woefully inadequate affidavits, which—although disputing respondent's testimony—contained nothing which conclusively proved it false, let alone willfully perjurious. Appellant's argument that the judgment should be set aside because respondent perpetrated a fraud on the court is therefore entirely meritless.

Equally meritless is appellant's contention that the judgment exceeds the amount requested in respondent's petition and thus is beyond the court's jurisdiction. The rule referred to by appellant is codified in Code of Civil Procedure section 580: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint." The rationale behind this section is that it would be unfair to saddle a defendant with an exorbitant judgment after he has let a case go by default because of the minor amount requested.

Such is not the case here, however. The form petition filed by respondent indicates that the community assets of the parties are "several billion dollars, the exact number of which billions is not as yet ascertained." Sheikha Al-Fassi checked off the box on the form petition requesting the court to determine the property rights of the parties. This is sufficient to put appellant on notice that at least a billion dollars in community property was at stake. The amount awarded does not exceed this sum and consequently is within the jurisdiction of the court. Furthermore, we find no error in the court's division of the community property by way of an award of a money judgment to the wife, as this is fully within the broad discretion given to the court by Civil Code section 4800.

Appellant lastly contends that the evidence admitted at the prove-up hearing is insufficient to support the judgment as it consisted entirely of oral testimony, without any documentation of the couple's alleged community assets. It is ironic that appellant should now raise this contention, as it is the result of his own refusal to comply with the court's discovery orders

that such documents could not be presented. Regardless of this, however, we can find no rule of evidence that such documentation is required before a default judgment can be held valid. The court heard the testimony of respondent's witnesses and was free to accept or reject it. The court evidently chose to accept it. Oral testimony is as inherently valid and probative as any document. We therefore see no grounds for reversing the default judgment.

The order is affirmed.

NOT FOR PUBLICATION IN THE OFFICIAL REPORTS.

KINGSLEY, J.

We concur:

WOODS, P.J.

ARGUELLES, J.

APPENDIX B

SUPREME COURT
FILED
Nov 19 1986
LAURENCE P. GILL, Clerk

ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL

2ND DISTRICT, DIVISION 4, NO. B016730

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE THE MARRIAGE OF AL-FASSI

AL-FASSI, PETITIONER AND RESPONDENT,

v.

AL-FASSI, RESPONDENT AND APPELLANT.

Petition for review of Petitioner and Respondent DENIED.

BIRD, *Chief Justice*

APPENDIX C

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.